No. 77-974

In the Supreme Court of the United States

OCTOBER TERM, 1977

ARTHUR E. HALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 1-8) is reported at 559 F. 2d 1160. The opinion of the court of appeals on an earlier appeal in this case is reported at 521 F. 2d 406 (Pet. App. A 14-17). The oral opinion of the district court (Pet. App. A 12-13) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1977. A petition for rehearing with suggestion for rehearing *en banc* was denied November 7, 1977 (Pet. App. A 9). On December 1, 1977,

Mr. Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including January 6, 1978, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an indictment for smuggling under 18 U.S.C. 545 that provides notice that the smuggled property is subject to criminal forfeiture is insufficient where the property has already been forfeited in a civil proceeding pursuant to 19 U.S.C. 1497.

2. Whether, following a successful appeal that reversed a conviction for smuggling certain property on grounds of a defect in the indictment, petitioner's retrial is barred by the Double Jeopardy Clause.

3. Whether reprosecution under an indictment alleging that the smuggled property is subject to forfeiture would subject petitioner to multiple criminal punishments in violation of the Double Jeopardy Clause because the property had already been forfeited pursuant to a civil proceeding under 19 U.S.C. 1497.

4. Whether the district court had authority to dismiss an indictment because a retrial was not likely to result in further punishment of petitioner.

STATUTES INVOLVED

18 U.S.C. 545 provides in pertinent part:

> Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced * * * [s]hall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> * * * * *
>
> Merchandise introduced into the United States in violation of this section * * * shall be forfeited to the United States.

19 U.S.C. 1497 provides in pertinent part:

> Any article not included in the [customs] declaration and entry as made * * * by such person * * * shall be subject to forfeiture and such person shall be liable to a penalty equal to the value of such article.

STATEMENT

In an indictment returned in the United States District Court for the Western District of Washington, petitioner was charged with smuggling two diamond rings into the United States in violation of 18 U.S.C. 545. Following a non-jury trial, petitioner was convicted. On September 19, 1974, the district court sentenced him to one year's unsupervised probation, conditioned upon the entry of a civil decree, pursuant to 19 U.S.C. 1497, forfeiting the rings to the United States. A consent decree to the forfeiture of the rings was entered the same day.

At the close of trial, the district court had ruled that criminal forfeiture of the rings under Section 545 was unavailable to the government because the indictment had failed to mention the forfeiture provisions of Section 545, as required by Rule 7(c)(2), Fed. R.

Crim. P. (2 Tr. 24).[1] However, during the trial the court had been informed that the government had elected to pursue forfeiture of the rings under the civil provisions of 19 U.S.C. 1497, and that petitioner had been so notified.[2] The court expressed concern that any civil forfeiture proceedings be concluded prior to the imposition of its sentence, to insure that the Customs Service would not use the civil proceedings to second guess the court's exercise of sentencing discretion (1 Tr. 86; 2 Tr. 20–21). At petitioner's sentencing hearing, the court again inquired into the status of the civil forfeiture and was informed that, since the time of trial, petitioner had been notified by the Customs Service that formal proceedings under Section 1497 were being initiated, but that no complaint had yet been filed or decree entered (S. Tr. 9–10). The court explicitly noted that it viewed the pending civil forfeiture of the rings as a mitigating factor in determining petitioner's sentence, and it was in these circumstances

[1] "1 Tr." and "2 Tr." refer to the two-volume transcript of petitioner's August 1974 trial. "S. Tr." refers to the transcript of sentencing proceedings on September 19, 1974.

[2] During petitioner's testimony at trial, he referred to the fact that the rings had been seized by a customs agent. The court then inquired whether the government had elected "to forfeit these rings under another statute" and was informed that it had (1 Tr. 51). Thereafter, petitioner introduced into evidence a letter from the Customs Service dated April 30, 1974 (prior to his May 21, 1974 indictment) informing him that he had violated 19 U.S.C. 1497 and was liable to the forfeiture of the rings plus a personal penalty equal to their value (1 Tr. 57–59).

that the court's conditional sentence was imposed (S. Tr. 10–12).

Petitioner appealed his conviction, and the court of appeals reversed (521 F. 2d 406; Pet. App. A 14–17). The court ruled that the indictment was defective and should be dismissed because it did not provide petitioner with notice of the forfeiture provision of Section 545, as required by Fed. R. Crim. P. 7(c)(2).[3] Petitioner did not appeal the civil forfeiture decree; he satisfactorily completed his probationary period prior to the district court proceeding on remand.

Petitioner was reindicted under Section 545 for the same offenses; the second indictment contained the additional language required by the court of appeals notifying him of the forfeiture provision of Section 545. Petitioner moved to dismiss the indictment on a number of grounds, including insufficiency of the indictment, abuse of prosecutorial discretion, and the claim that the forfeiture of the rings was a prior criminal punishment which, under the Double Jeopardy Clause, barred his retrial. In an oral opinion, the district court rejected petitioner's contentions, but nonetheless dismissed the indictment because the second trial could not result in any further punishment, but simply in "tagging" petitioner as a felon (Pet. App. A 12–13).

[3] The court denied the government's petition for rehearing and suggestion for rehearing *en banc*.

The government appealed the dismissal of the indictment, and the court of appeals reversed (Pet. App. A 1–8). The court held that the fact that petitioner had completed the probationary sentence imposed on his first conviction did not create a double jeopardy bar to his retrial (Pet. App. A 5). The court also rejected petitioner's claim that the forfeiture was a prior criminal punishment that precluded his retrial, noting that the forfeiture provisions of 19 U.S.C. 1497 are civil and that the double jeopardy clause is not implicated in the absence of multiple criminal punishments (Pet. App. A 4–5). The court went on to state, however, that it did not need to "definitively decide this issue" because "[petitioner] may be acquitted upon retrial" (Pet. App. A 5). It specifically declined to comment upon the continuing validity of the original forfeiture judgment (*ibid.*).

The court found that petitioner's other arguments for dismissing the indictment were without merit. It rejected petitioner's claim that the district court's action was a proper exercise of its inherent power to do justice and concluded that on the facts of this case the district court had no power to dismiss the indictment (Pet. App. A 5–7, 8).

ARGUMENT

Petitioner's various contentions have a certain Alice-in-Wonderland quality that derives from the relationship between his present claims and the court of appeals' disposition of petitioner's appeal from his

original conviction. Those contentions and our responses may best be understood by briefly reviewing at the outset some settled legal propositions and the decision of the court of appeals on the first appeal.

The United States may seek the forfeiture of smuggled goods either pursuant to the criminal prosecution of the smuggler under 18 U.S.C. 545 or in a civil proceeding under 19 U.S.C. 1497. As this Court held in *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, an acquittal of the alleged smuggler in a prosecution under Section 545 does not preclude a civil forfeiture proceeding under Section 1497. If the government seeks forfeiture of the smuggled goods under Section 545, then Fed. R. Crim. P. 7(c)(2) requires that "the indictment or the information shall allege the extent of the interest or property subject to forfeiture."

Petitioner's original indictment under 18 U.S.C. 545 did not allege that the two diamond rings, which were described in the indictment, were subject to forfeiture, and accordingly the district court ruled that the rings could not be automatically forfeited under that section upon conviction. In considering the appropriate sentence to be imposed upon petitioner for his crime, however, the court apparently concluded that it would ameliorate the sentence if it were certain that the rings would in fact be forfeited. Since the formal civil forfeiture proceeding had not yet been instituted, the court dealt with the uncertainty by conditioning the imposition of probation on petition-

er's consent to the forfeiture of the rings in a proceeding under 19 U.S.C. 1497. He did consent, and the rings were forfeited. Petitioner did not appeal that forfeiture and stresses in his petition that the rings have been irrevocably forfeited (Pet. 8, 12–13).

On the first appeal, the court of appeals ruled that the indictment was defective and should be dismissed because petitioner's consent to the forfeiture of the rings had not been voluntary, and the indictment had failed to allege that the rings were subject to forfeiture, in violation of Fed.R.Crim.P. 7(c)(2). The court rejected the district court's holding and the government's contention that the appropriate remedy for the indictment's failure to allege the property subject to forfeiture is not to dismiss the indictment but to bar forfeiture pursuant to 18 U.S.C. 545. Although it recognized that the purpose of the provision in Rule 7(c)(2) was to implement certain forfeiture statutes not involved in the present case, it nevertheless concluded that the language of the rule was "mandatory" and compelled reversal of the conviction (Pet. App. A 16). In so doing, we believe the court erred in overlooking the command of Fed.R.Crim.P. 52(a) that errors not affecting substantial rights—and this "error" was of course wholly irrelevant to the validity of the smuggling conviction—must be disregarded. Thus while there might have been some arguable logic to the court's position if it had concluded that under the circumstances the civil forfeiture was really part of the criminal prosecution and thus declared the

forfeiture (but not the conviction) invalid,[4] the remedy the court gave petitioner was wholly unrelated to the "error" perceived by the court.

In order to conform to the court's ruling, the government obtained a new indictment containing an allegation with respect to the rings subject to forfeiture.[5]

1. Petitioner now contends (Pet. 8–9) that the new indictment is defective because, although it conforms to Rule 7(c)(2) and the court of appeals' original decision, it does not provide him with an opportunity to defend against the forfeiture alleged because the rings have already been forfeited.

This contention is wrong on two counts. First, at least as between these parties in this case, it is law of the case, adopted by the court of appeals at petitioner's behest, that the indictment must be drafted as it

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[4] In our view such a conclusion, although perhaps internally consistent, would have been clearly incorrect because it would have been based on the view that petitioner's consent to the civil forfeiture was invalid. The fact that petitioner consented to the civil forfeiture as a condition of receiving probation does not make that consent involuntary or invalid, any more than a defendant's decision to plead guilty in order to avoid conviction on a greater offense renders the plea invalid. See *Bordenkircher* v. *Hayes*, No. 76–1334, decided January 18, 1978.

[5] We could, of course, have sought this Court's review of that decision. Since that decision was based only on what we believed to be an immaterial omission from the indictment, we concluded that it was more appropriate to seek a superseding indictment rather than to delay proceedings further and unnecessarily burden this Court with a request to review a somewhat unusual decision that, although in our view incorrect, was not likely to have significant precedential effect.

now stands regardless of whether the proceedings can themselves adjudicate the forfeiture of the rings. There is thus nothing wrong with the indictment.

Secondly, while ordinarily a conviction in a criminal smuggling prosecution will result in a forfeiture, *One Lot Emerald Cut Stones, supra,* makes clear that the defendant cannot defeat the forfeiture by gaining an acquittal. Rule 7(c)(2), as applied in the context of a smuggling case such as this, is a notice provision rather than a requirement that opportunity for conclusive litigation of the forfeiture be afforded in the criminal prosecution. While it seems unnecessary to require the indictment to contain notice of the possibility of a forfeiture that in fact cannot occur as a result of the criminal prosecution, that is dictated here by petitioner's success in the first appeal, and he is in no position now to complain that the government has done what he previously urged was essential.

2. Petitioner also contends, without offering any reasons (Pet. 9–10), that reprosecution would subject him to two trials for the same offense in violation of the Double Jeopardy Cause. As the court below noted (Pet. App. A 3), however, it is firmly established that the Double Jeopardy Clause does not prohibit retrial where, as here, the defendant has succeeded in getting his first conviction set aside on appeal. See, *e.g.*, *North Carolina* v. *Pearce*, 395 U.S. 711, 719–726; *United States* v. *Ball*, 163 U.S. 662, 672.

Petitioner errs in contending (Pet. 6, 9–10) that the court below declined to rule on his double jeopardy

claims. The court clearly ruled, with reference to petitioner's claims, that "[w]e * * * find no impediment to retrial of [petitioner]. His position is neither better nor worse than that of any other defendant faced with a retrial after successfully attacking his original conviction" (Pet. App. A 4). The issue the court said it "need not definitively decide" (Pet. App. A 5) was petitioner's claim that the original civil forfeiture was in effect part of his criminal punishment, and that forfeiture pursuant to his criminal reprosecution would thus constitute multiple criminal *punishments* for the same offense (see Pet. App. A 4–5). While, as we so proceed to discuss, that claim is insubstantial, the court below properly concluded that it need not decide any double jeopardy challenge to multiple criminal punishments until such punishments have in fact been imposed.

3. Petitioner next contends (Pet. 10–13) that the original civil forfeiture was part of his criminal punishment and that subjecting him to forfeiture of the rings again as part of his criminal reprosecution will subject him to multiple criminal punishments for the same offense. That claim is unsound. If a judgment of forfeiture under 18 U.S.C. 545 is ever entered at the conclusion of petitioner's reprosecution, there would be no basis for concluding that such a judgment would augment any punishment previously imposed, even if were assumed that the prior civil forfeiture was in reality a criminal punishment. A judgment of criminal forfeiture of property that has already been forfeited imposes no added sanction at

all. In any event, this Court clearly held in *One Lot Emerald Cut Stones, supra,* that forfeiture under 19 U.S.C. 1497 is a civil proceeding and not a criminal punishment.[6]

4. The court of appeals correctly concluded that the district court had no authority to dismiss the indictment solely because petitioner had already completed service of his probationary sentence. The district court did not attempt to rest the dismissal of the indictment on any legal defect. Indeed, petitioner concedes (Pet. 16–17) that the dismissal was based on the court's conclusion that no legitimate societal interest could be served by a retrial "just for the purpose of tagging this defendant as a felon" (Pet. App. A 13). Such a determination was for the prosecutor, not the court, to make. Courts simply do not possess a general power to dismiss valid indictments on the basis of a general judgment that such action would be "in the interests of justice." See *United States* v. *Weinstein,* 452 F. 2d 704 (C.A. 2), certiorari denied *sub nom. Grunberger* v. *United States,* 406 U.S. 917.

None of the cases cited by petitioner support his contention that the district court's action was a proper exercise of an inherent power to do justice, or his claim that the court of appeals' decision conflicts with

[6] Moreover, if, under the circumstances of this case, the prior civil forfeiture was a criminal punishment imposed as part of the original criminal proceeding, the necessary conclusion would be that that forfeiture was vacated when the court of appeals ordered the indictment dismissed. On that assumption, forfeiture pursuant to petitioner's reprosecution would be the only forfeiture of the rings.

those of other circuits. While a court has authority to dismiss indictments for reasons of due process, "the Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment." *United States* v. *Lovasco,* 431 U.S. 783, 790. See also *United States* v. *Nixon,* 418 U.S. 683, 693.

Even if some general power existed for courts to refuse to try valid indictments, this would be a wholly inappropriate occasion for its exercise. Here the government concluded that if, as was proved at the first trial, petitioner willfully violated the criminal law, he should be criminally convicted, because such a conviction would serve significant deterrent interests, reflected in 18 U.S.C. 545. This is so even though petitioner is not likely to be subject to any direct sanctions in addition to those which have already been imposed and satisfied.

Thus, the judgment to proceed with the prosecution does not reflect personal animosity against petitioner or resentment against his successful appeal. As the court of appeals noted (Pet. App. A 7) "there is absolutely nothing in this record indicative of any vindictiveness, or, indeed, any appearance of vindictiveness." Since petitioner's retrial is authorized by statute and does not violate any constitutional restrictions, the district court was not free to substitute its own judgment as to whether reprosecution should be sought for that of the prosecutor.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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